AJN

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO.162 OF 1989

The State of Maharashtra) ... Appellant

Versus

1. Narayan Kalu Kamble,)
age about 50 years,)
Occ. Service, residing at Waddi,)
Tal. Miraj, Dist. Sangli.

2. Bhupal Babaji Kamble,)
aged about 32 years,)
Occ. Service, residing at Waddi)
Tal. Miraj, Dist. Sangli.) ... Respondents

Ms. P.H. Kantharia, A.P.P. for the State.

Mr. Ashok P. Mundargi with Mr. Ganesh Gole for the respondents.

CORAM: SMT. RANJANA DESAI &
A.S. OKA, JJ.

DATED: 2ND DECEMBER, 2004.

ORAL JUDGMENT:- (Per Smt. Ranjana Desai, J.)

1. The respondents (for convenience, "accused 1 and 2 respectively") were tried in Sessions Case No.23 of 1987 in the Court of the Additional Sessions Judge, Sangli at Sangli, for offences punishable under section 302 read with section 34 of the Indian Penal Code (for short, "the IPC"). Accused 2 was further charged for the offence punishable under section 323 of the IPC. Accused 1 was individually charged under section 302 of the IPC simplicitor.

2. At the trial, the case of the prosecution was as follows: Complainant - Vishwanath Shivaji Kamble and the accused are residents of Village Waddi, Taluka Miraj, District Sangli. Deceased Maruti was his younger brother. Just a day prior to the incident in question i.e. 11/12/1986, according to the prosecution, there was a pravachan in Harijan-wada. About 100 to 125 persons had assembled there. At that time, a quarrel was going on between Haibati Narayan Kamble, Vijay Kamble and Vijay Waghmare. According to the complainant, he along with others went to that place and intervened in the quarrel. Within five minutes, accused Haibati and Tarabai came to the place of pravachan with sticks. Accused 1 asked complainant Vishwanath as to why he separated the quarrel and gave him a threat that he would see him on the next day. On the next day i.e. on 12/12/1986, at about 6.30 a.m., complainant Vishwanath was going to attend the call of nature beyond the place of Miraj-Mhaisal Road, with a tin full of water. When he was at the distance of 20 ft. from Kushinara board, accused 1 came from behind Kushinara board. He was armed with an axe. He asked complainant Vishwanath as to why he intervened in the quarrel at night. He also abused him. Accused 1 rushed towards him raising an axe. Complainant Vishwanath avoided the blow. Thereafter, he raised alarm in the name of his mother. On hearing this, his mother Akkatai and brother Maruti (for convenience, "the deceased") came running there. The deceased asked accused 1 as to why he was picking quarrel. Accused 1 gave threats to the

deceased. He gave an axe blow on the head of the deceased. The deceased was about to fall. Complainant Vishwanath caught hold of him. That time accused 2 came there. Accused 1 gave axe blow on the head of the deceased. Accused 2 gave stick blow on the head of the complainant. Accused 2 also gave another stick-blow on his finger. He also gave stick blows on the waist and back of Akkatai, the mother of the complainant. Shivaji Magdum and Prabhakar Waghmare were standing near the bus stop. Madan Naik was standing near the bullock-cart. Narayan Shinde was standing near Kushinara board. These people separated the quarrel. Somebody called the tractor of Sarpanch and, thereafter, the complainant, Prabhakar Waghmare and Laxman Waghmare carried the deceased in a tractor to Miraj Rural Police Station. From there, the deceased was sent to Civil Hospital, Sangli, for treatment along with police yadi. As the condition of the deceased was precarious, he was immediately sent to the Civil Hospital, Sangli along with police yadi. Head-constable Jamdade recorded the complaint of Vishwanath, which is at Ex-24. As Vishwanath had sustained injuries on his head, he was examined at the Civil Hospital, Sangli. Investigation was started on the basis of the complaint lodged by Vishwanath. Maruti succumbed to his injuries on 16/12/1986 and, hence, offence, which was lodged under section 307 of the IPC was converted into section 302 of the IPC. After completion of the investigation, the accused came to be charged as aforesaid.

3. In support of its case, the prosecution examined as many as 14 witnesses. The prosecution story rests on the evidence of four eye-witnesses PW-5 Shivaji Laxman Magdum, PW-7 Vishwanath Shivaji Kamble, PW-10 Prabhakar Monappa Waghmare and PW-11 Narayan Rudrappa Shinde. PW-8 Damyanti Mansuklal Shah had done the post-mortem on the corpse of the deceased. She has produced the post-mortem notes, Ex-26. PW-9 Dr. Ajit Annasaheb Shinde had examined complainant Vishwanath on 12/12/1986. Details of investigation are given by PW-14 PSI - Prakash Laxman Bhosale. The defence of the accused was one of denial. After considering the evidence on record, the learned Sessions Judge acquitted the accused of all the charges and, hence, this appeal by the State of Maharashtra.

4. We have heard, at considerable length, Ms. Kantharia, the learned A.P.P. in support of the appeal and Mr. Mundargi, the learned counsel appearing for the respondents-accused. With the assistance of the learned counsel, we have gone through the evidence and the record of the case.

5. Ms. Kantharia, the learned A.P.P. contended that the impugned judgment is perverse and deserves to be set aside. She submitted that the learned Sessions Judge has wrongly discarded the evidence of eye-witnesses PW-5 Shivaji Laxman Magdum, PW-7 Vishwanath Shivaji Kamble, PW-10 Prabhakar Monappa Waghmare and PW-11 Narayan

Rudrappa Shinde. She submitted that the evidence of the eye-witnesses is consistent. She submitted that Vishwanath is an injured witness. He has no reason to falsely implicate anyone as assailant of his brother. According to the learned A.P.P., PW-5 Shivaji Magdum has corroborated the evidence of PW-7 Vishwanath. She submitted that even the chemical analyser's report indicates that the blood group found on the clothes of the accused matches with the blood group of the deceased. The learned A.P.P. contended that this incriminating circumstance is ignored by the trial court. In the circumstances, the learned A.P.P. contended that the order of acquittal be overturned and the accused be convicted in accordance with law.

6. As against this, the learned counsel for the respondents-accused contended that there are glaring inconsistencies and omissions in the evidence of the so-called eye-witnesses. He submitted that the learned judge has rightly discarded the evidence as it does not inspire confidence. He submitted that PW-10 Prabhakar Waghmare and PW-11 Narayan Shinde have stated in their evidence that they did not intervene in the quarrel, which was going on between the deceased and the accused whereas, the complainant and PW-5 Shivaji had stated that they intervened. Therefore, the evidence of all the witnesses becomes unreliable. Though it is the case of the complainant that the accused intervened in the quarrel, which had taken place in the previous night, in

the FIR, the complainant has omitted to say so. Therefore, the possibility of the complainant falsely implicating the accused cannot be ruled out. The learned counsel further contended that it is clear from the evidence of PW-5 Magdum that he went to the scene of offence after the scuffle was over. Therefore, his claim that he saw the incident is false. The learned counsel further pointed out that the mother of complainant Vishwanath has not been examined, which also makes the prosecution story suspect. He contended that the learned judge has rightly not placed reliance on the discovery evidence and, therefore, there is hardly any evidence to link the accused with the crime in question. The learned counsel contended that since this court is dealing with an appeal against acquittal and since the view taken by the Sessions Court is a reasonable view, this court should not interfere with it. In any event, the learned counsel submitted that there is hardly any evidence against accused 2 and, hence, his acquittal should be confirmed. The learned counsel further submitted that in case this court comes to the conclusion that accused 1 is guilty of any offence, then in the facts of this case, at the most, he can be convicted under section 304 Part II of IPC because he had, in fact, come to assault the complainant and not the deceased and assault on the deceased seems to have been made in the heat of passion and without any intention.

7. Before we deal with the rival contentions, it is

necessary to have a look at the injuries sustained by the deceased. PW-8 Dr. Damyanti Mansuklal Shah has done the post-mortem on the corpse of the deceased. She found the following external injuries on the deceased.

"(1) Abrasion over the left knee joint.

(2) Stiched wound over Rt.side extending from right eyebrow upward upto the parietal region 15 cm. in length verticle".

She found the following internal injuries on the deceased.

"(1) Fracture of the skull, right front pareital bone with 1 cm. separation of bone segment upto skull vault.

(2) Laceration of right side of cerebrum with 3 cm. x 5 cm. cerebral haemorrhage all over the right side."

8. In the opinion of the doctor, the cause of death was fracture of skull and shock due to cerebral laceration and cevebral haemorrhage. When muddemal article, Ex-11 was shown to her, Dr. Shah stated that the injuries mentioned in column 19 can be caused by such weapon.

9. To appreciate the case of the prosecution, it would be necessary to have a look at the evidence of PW-7 Vishwanath Kamble, who is the brother of the deceased and who was injured in the incident in question. Vishwanath has stated that at 6.30 a.m. in the morning of 12/12/1986, he went to attend the call of nature beyond the place of Miraj-Mhaisal road with a tin full of water. When he was at a distance of 20 ft. from Kushinara board, accused 1 came from behind Kushinara board with an axe. He asked Vishwanath why he had separated the quarrel which had taken place in the night. He abused Vishwanath. Accused 1 rushed towards him with an axe. Vishwanath avoided the blow and raised alarm. On hearing his cries, his mother Akkatai and the deceased came running there. The deceased told accused 1 as to why he was picking quarrel now for the quarrel which had taken place in the night. Accused 1 gave threats to the deceased. He gave axe blow on the head of the deceased, which caused bleeding injury. The deceased was about to fall. Complainant Vishwanath caught hold of him. At that time, accused 2 came there. He gave stick blow on the head of Vishwanath. He gave another stick blow on the finger of Vishwanath. He also gave stick blows on the waist and back of his mother Akkatai. PW-5 Shivaji Magdum and PW-10 Prabhakar Waghmare were standing near the bus stop. Madan Naik was standing near the bullock cart. PW-11 Narayan Shinde was standing near Kushinara board. These persons tried to intervene in the quarrel. Then a tractor was called. Vishwanath, Prabhakar

Waghmare and Laxman Waghmare carried the deceased in tractor to Miraj Police Station. At Miraj Police Station, Vishwanath's complaint, Ex-24 was recorded. Vishwanath was sent to the Civil Hospital, Sangli, with police yadi. He has given the details of the quarrel which had taken place on the previous day at the time of pravachan between Haibati, Narayan Kamble, Vijay Kamble and Vijay Waghmare. He has stated that on hearing the commotion, he, Dattatraya Waghmare and others went to that place and intervened in that quarrel. Within five minutes, accused 1, accused 2, Haibati and Tarabai came there and accused 1 asked him as to why he had intervened in the quarrel and he told Vishwanath that he would see him on the next day. Vishwanath produced the bloodstained clothes, which were on the person of the deceased before the police and they were attached under the panchanama. He also produced his banian. According to him, Muddemal articles 6 to 10 are the said clothes.

10. Evidence of this witness is attacked on the ground that though in the court he has stated that on the previous night when there was a quarrel, the accused were present, he has omitted to say so in the FIR. It is then pointed out that there was a Sessions case against him for assaulting accused 1 and, therefore, the possibility of his falsely implicating the accused cannot be ruled out. It is further pointed out that there are certain omissions in his evidence. He has stated in the court that he had seen some persons standing near the bus stop.

That statement, however, is not found in the FIR. According to him, in the FIR, he had referred to the conversation between the deceased and accused 1 before the deceased was dealt with an axe blow. However, he could not assign any reason as to why such recitals are not found in the FIR. It is also pointed out that he has admitted in the evidence that accused 1 did not assault the deceased from the back and the statement made by him to that effect in the FIR is wrong and the blow was given on the head of the deceased. It is, therefore, urged that it is risky to rely on the evidence of this witness.

11. We are unable to agree with the learned counsel. It must be borne in mind that this witness was injured during the incident. PW-9 Dr. Ajit Shinde had examined him. Dr. Ajit has stated that the following injuries were found on the person of Vishwanath.

"(1) C.L.W. left ring-finger 1" x 1/4" fresh.

(2) C.L.W. left backside of head 1/4" x 1/4" fresh skin deep."

12. The injuries on his person, according to Dr. Ajit Shinde, were caused within six hours. The injuries were found on left ring-finger and left backside of the head of Vishwanath. These injuries are consistent with the discreption of the stick blows given by Vishwanath in his evidence. Dr. Shinde has stated that the said injuries

are possible by hand and blunt substance. It was suggested to the doctor that the injuries could be caused by a fall. The doctor has clarified that the head injury is possible by a fall but injury caused to the ring finger is not possible by a fall. The learned counsel Mr. Gole tried to contend that Dr. Ajit Shinde has stated in the cross-examination that Vishwanath told him that the injuries were caused at 7.30 a.m. whereas, it is the case of the prosecution that the incident had taken place at 6.30 a.m. We do not attach much importance to this variation in the time. Vishwanath is a rustic witness. The time given by the rustic witnesses may not be accurate. In our opinion, nothing turns on this variation. So far as the omissions are concerned, in our opinion, they are also minor omissions. FIR is not expected to be a treatise. We cannot discredit Vishwanath on account of the said omissions. As regards attack made on him and on the deceased, the evidence of Vishwanath is consistent. In his cross-examination, he has frankly stated that what is stated by him in the FIR that the axe blow was given on the deceased from his back is an incorrect statement. We, therefore, find that the evidence of this witness has a ring of truth. Merely because a Sessions case is pending against him for assault on accused 1, it cannot be said that he is telling falsehood. In fact, because of this, we have cautiously examined his evidence to rule out the possibility of any concoction. We find him to be a truthful witness. The injuries sustained by him

strengthen his story. We have no reason to disbelieve him. It is supported by the evidence of PW-5.

13. PW-5 Shivaji Laxman Magdum has stated that on 12/12/1986 at 6.30 a.m., he was standing at the Dhavali bus stop. The board of Kushinara chowk is at a distance of 25 to 30 ft. from Dhavali stop. He was waiting for S.T. Vishwanath was going to attend call of nature by the side of this board. At that time, accused 1 came from the back of the board armed with an axe. He asked Vishwanath as to why he had intervened in the quarrel that had taken place in the night. He started threatening Vishwanath. He raised the axe and rushed towards Vishwanath with a view to assaulting him. Vishwanath avoided the blow and raised a cry. At that time, the deceased and Akkatai came there. The deceased tried to pacify accused 1. Accused 1 was enraged and gave axe blow on the head of the deceased. The deceased was about to fall. Vishwanath caught hold of him. By the time, accused 2 came there. He gave stick blows on the head of Vishwanath. He also assaulted Akkatai with stick. This witness saw this scuffle from a distance of 20 to 25 ft. He then tried to separate them. The deceased was having injuries on his head. A tractor was brought and the deceased was carried in the tractor. It is pertinent to note that in the FIR, which is immediately lodged by Vishwanath, he has mentioned that Shivaji tried to separate the accused and Vishwanath. This lends support to the case of this witness that he

tried to intervene in the quarrel. His version in the examination-in-chief and cross-examination is consistent.

14. It is pointed out that in the cross-examination, this witness has said that he and Prabhakar alone came to the spot where the scuffle was going on. When they came forward, at that time, about 25 to 30 persons had assembled there. He has further stated that when 25 to 30 persons assembled there, the scuffle was already over and, therefore, by the time this witness came there, the incident of assault on the deceased must have been over. We are unable to agree with the learned counsel. The above sentence, in our opinion, is torn out of context. In the examination-in-chief as well as in the cross-examination, consistently, this witness has stated that he had seen the incident from the bus stop and he went there and separated the scuffle. If this sentence is read in the context of the other facts clearly stated by him, it is obvious that what this witness wishes to convey is that first he and Prabhakar went forward. He tried to separate the scuffle and by the time 25 to 30 persons arrived there, the scuffle was already over. Certain omissions in his evidence are also pointed out to us. He has omitted to say that he was going to answer the call of nature with a tin full of water and accused 1 was coming with axe from the side of Kushinara chowk. These omissions have been proved by PW-14 PSI Bhosale. In our opinion, they are not material omissions. This witness has stated in the cross-examination that he had

not stated before the police that accused 1 was saying that Vishwanath had become powerful; that Vishwanath raised alarm in the names of the deceased and his mother and on hearing the alarm the deceased and his mother came there; that while the deceased was about to fall accused 2 came there with a stick. A witness is not expected to repeat word to word the entire police statement in the court. There are bound to be some variations, some additions and some minor omissions. Sequence of events can also not be identical. If the basic story of the prosecution is consistently stated the witness can be relied upon. It is also pointed out that this witness has admitted that he had not stated before the police that accused 1 assaulted the deceased as he became enraged. But the omission is only as regards accused 1 becoming enraged. There is no omission as regards the fact that accused 1 had assaulted the deceased with an axe.

15. Our attention was drawn to the statement made by this witness that when the scuffle was going on between accused 1 and Vishwanath, he had not gone there. We do not think that this is a wrong statement made by this witness. On a proper reading of the evidence of this witness, it is clear that he went to separate the scuffle only when accused 2 arrived and accused 2 attacked Vishwanath. He had stated in the examination-in-chief that after accused 2 came with stick he abused Vishwanath and others and he gave stick blows to Akkatai. He

witnessed this incident from a distance of 20 to 25 feet. He then tried to separate the scuffle. This means that all along he was standing at the bus stop and when accused 2 came there and started attacking, he had gone forward. Considering the fact that his name is mentioned in the FIR, which is lodged immediately after the incident, we find it safe to rely on his testimony. His evidence is also consistent with the evidence of complainant Vishwanath on the material aspect of the prosecution story. We are of the opinion that this witness is a witness of truth.

16. While considering the evidence of a simple, unsophisticated rustic witness, the court cannot apply rigid standards. In this connection, we may refer to the following observations of the Supreme Court in **State of U.P. v. M.K. Anthony, AIR 1985 SC 48**.

> "While appreciating the evidence of a witness, the approach must be whether the evidence of the witness read as a whole appears to have a ring of truth. Once that impression is informed, it is undoubtedly necessary for the court to scrutinise the evidence more particularly keeping in view the deficiencies, draw-backs and infirmities pointed out in the evidence as a whole and evaluate them to find out whether it is against the general tenor of

the evidence given by the witness and whether the earlier evolution of the evidence is shaken as to render it unworthy of belief. Minor discrepancies on trivial matters not touching the core of the case, hyper-technical approach by taking sentences torn out of context here or there from the evidence, attaching importance to some technical error committed by the investigating officer not going to the root of the matter would not ordinarily permit rejection of the evidence as a whole. If the Court before whom the witness gives evidence had the opportunity to form the opinion about the general tenor of evidence given by the witness, the appellate Court which had not this benefit will have to attach due weight to the appreciation of evidence by the trial court and unless there are reasons weighty and formidable it would not be proper to reject the evidence on the ground of minor variations or infirmities in the matter of trivial details. Even honest and truthful witnesses may differ in some details unrelated to the main incident because power of observation, retention and reproduction differ with individuals. Cross-examination is an unequal duel

between a rustic and refined lawyer."

The above observations of the Supreme Court persuade us to believe PW-5 Shivaji and PW-7 Vishwanath.

17. So far as the other two witnesses viz. PW-10 Prabhakar Waghmare and PW-11 Narayan Shinde are concerned, though they claim to be eye-witnesses and though it is stated by the complainant and PW-5 Shivaji Magdum that they tried to intervene in the quarrel, they have denied this fact. We find some justification in the submissions of the learned counsel that it would not be safe to take this evidence into consideration. We, therefore, propose to leave the evidence of these two witnesses out of consideration. But, we are of the opinion that even if we leave the evidence of these two witnesses out of consideration, the accused can be convicted on the testimony of PW-7 Vishwanath and PW-5 Shivaji Magdum because their evidence is also corroborated by other evidence on record to which we shall soon advert.

18. PW-4 Vijay Mulik is the pancha to the panchanama under which the axe was recovered at the instance of accused 1. The axe is Muddemal article 11. At the instance of accused 2, the stick was also discovered. We feel that the learned judge has wrongly discarded this evidence. The evidence of PW-4 Vijay Mulik is also corroborated by the evidence of the Investigating Officer. No acceptable reasons have been given by the

learned judge as to why the discovery should be discarded. It is pertinent to note that on the axe, Muddemal Article 11, blood stains were found. This is an additional incriminating circumstance against the accused.

19. We must also refer to the chemical analyser's reports, Ex-38 and Ex-40. The chemical analyser's reports show that the blood group of accused 1 as "B". The blood group of accused 2 was not taken as he was not injured. The blood group of complainant Vishwanath is "A". PW-14 PSI Prakash Laxman Bhosale has stated that Muddemal articles viz. the clothes found on the body of deceased Maruti were handed over to Vishwanath and were seized under panchanama Ex-7. Though the blood group of the deceased could not be identified, it is clear from the chemical analyser's report that the blood of 'O' group was found on Ex-3 and Ex-4, which are towel and lungi, which were found on the person of the deceased. It is significant to note that on the axe i.e. Muddemal article 11, blood of 'O' group was found. It is also pertinent to note that on the clothes of accused 1 which are Muddemal articles 8, 9 and 10, blood of 'O' group was found. It is true that accused 1 was injured but, his blood group being 'B' finding of blood stains of 'O' group on his clothes is a clinching circumstance which connects him to the offence in question.

20. It was urged by the learned counsel for the accused

that PW-2 Ayyas Choudhari has stated that accused 1 was having injuries on his person. However, the other prosecution witnesses have tried to avoid referring to them. PW-4 Vijay Mulik, who is the pancha has stated that he had not seen any injury on the person of the accused. The learned counsel urged that non explanation of the injuries on accused 1 adversely affects the prosecution case and from this it must be concluded that the prosecution is suppressing the genesis of the case. We are unable to agree with the learned counsel. The injuries were suffered by accused 1 on 12/12/1986. PW-4 Vijay Mulik, is the pancha to panchanama (Ex-15) which was recorded on 17/12/1986. Therefore, if after five days, PW-4 Vijay Mulik does not notice injuries on accused 1, no adverse inference can be drawn from it. Besides, non explanation of injuries suffered by the accused is not always fatal to the prosecution case. In **Lakshmi Singh & Ors. v. State of Bihar (1976) 4 SCC 394**, the Supreme Court has observed that the omission on the part of the prosecution to explain the injuries on the person of the accused assumes much greater importance where the evidence consists of interested or inimical witnesses or where the defence gives a version which competes in probability with that of the prosecution one. The Supreme Court has further observed that there may be cases where the non-explanation of the injuries by the prosecution may not affect the prosecution case. This principle would obviously apply to cases where the injuries sustained by the accused are minor and

superficial or where the evidence is so clear and cogent, so independent and disinterested, so probable, consistent and credit-worthy, that it far outweighs the effect of the omission on the part of the prosecution to explain the injuries. Later judgments of the Supreme Court have consistently followed **Lakshmi Singh's case (supra)**. In the present case, according to PW-9 Dr. Shinde, the injuries suffered by accused 1 were minor injuries. Besides, the evidence adduced by the prosecution is consistent and cogent. The defence of the accused is of denial. There is no question of the defence version competing in probability with the prosecution case. Therefore, non-explanation of the injuries on the person of the accused, cannot affect the prosecution case adversely.

21. It was contended by Mr. Gole that the prosecution has not established motive. Assuming that is so, in our opinion, that does not affect the credibility of the prosecution case because the evidence of the two eye-witnesses namely PW-5 Shivaji and PW-7 Vishwanath is cogent and consistent. Absence of motive will have no adverse impact on the prosecution case.

22. In our opinion, the learned Sessions Judge has wrongly disbelieved the cogent and consistent evidence of the complainant and PW-5 Shivaji Magdum. He has not even discussed the chemical analysers report. We have no hesitation in describing the impugned judgment as

perverse. In our opinion, the view taken by the learned Sessions Judge could not have been taken by him on the facts which were before him. We, therefore, feel that it is necessary to set aside the order of acquittal of the accused.

23. So far as accused 2 is concerned, the allegation against him is that he gave stick blows to the deceased and the complainant. The prosecution has not led any evidence to establish common intention. The injuries suffered by the complainant appear to be simple injuries and, therefore, accused 2 cannot be convicted under section 302 of IPC. In our opinion, he will have to be convicted for a lesser offence under section 323 of the IPC. The record shows that accused 2 has undergone about five months imprisonment. We, therefore, feel that for offence under section 323, the imprisonment already undergone by him should be treated as the sentence of imprisonment. But, in addition to it, accused 2 should also pay a fine of Rs.5,000/-. In default of payment of fine, he will have to undergo further RI for six months.

24. So far as accused 1 is concerned, the learned counsel for the accused submitted that at the most, accused 1 could be said to have committed an offence under section 325 of the IPC. We are unable to agree with the learned counsel. Accused 1 has dealt axe blow on the head of the deceased. The blow was given with force, which resulted in a skull fracture. There was

separation of whole segment of skull vault. We are, therefore, unable to convict him under section 325 of the IPC. We, however, feel that he should be convicted under section 304, Part II of the IPC because in the facts of this case, it cannot be said that accused 1 had any intention to murder the deceased. In fact, it is the case of the prosecution that it is complainant Vishwanath, who had tried to separate the quarrel, which had taken place in the previous night and accused 1 wanted to assault complainant Vishwanath. Since the deceased intervened, in the heat of passion, accused 1 attacked on his head. It is true that axe was used by him and the blow landed on the vital part of the body of the deceased. But, from that it cannot be inferred that he had intention to murder the deceased. We, therefore, feel that accused 1 should be convicted under section 304 Part II of the IPC. Considering the peculiar facts and circumstances of the case and the fact that much time has elapsed from the date of incident, we feel that the sentence of four years RI and a fine of Rs.10,000/- and in default of payment of fine, RI for further one year would serve the ends of justice.

O R D E R:

(a) The impugned judgment and order dated 30/11/1988 passed by the Additional Sessions Judge, Sangli at Sangli in Sessions Case No.23 of 1987 is quashed

and set aside. Accused 2 Bhupal Babaji Kamble is convicted for offence under section 323 of the IPC. He has undergone about five months imprisonment. Hence, the sentence already undergone by him should be treated as sentence for this offence. In addition to this, accused 2 shall also pay a fine of Rs.5,000/-. In default, he shall undergo further RI for six months.

(b) Accused 1 Narayan Kalu Kamble is convicted under section 304, Part II of the IPC. For this offence, he is sentenced for four years RI and a fine of Rs.10,000/-. In default of payment of fine, he shall undergo further RI for one year.

(c) Appeal is disposed of in the aforestated terms.

(SMT. RANJANA DESAI, J.)

(A.S. OKA, J.)